No. 9210.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

THE SEA INSURANCE COMPANY, LTD., EAGLE STAR INSURANCE COMPANY, LTD., and THE TOKIO MARINE AND FIRE INSURANCE COMPANY, LIMITED,

Appellants,

vs.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, Owner of Steamship "ARKANSAN", etc.,

Appellee.

APPELLANTS' OPENING BRIEF.

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Statement of Pleadings and Facts Disclosing Basis of Jurisdiction.

This is a proceeding in admiralty arising out of the collision of the S.S. "Arkansan" and the S.S. "Knoxville City" which took place about 5:13 A. M. on the morning of September 19, 1937, just inside the entrance between the eastern and western breakwaters at Los Angeles Harbor, California.

Four separate causes of action arising out of the collision were consolidated for trial and were tried in the United States District Court for the Southern District of California, Central Division. The instant case was instituted by the filing of a libel *in rem* by the above-named

appellants against the S.S. "Arkansan" to recover for damage to cargo interests on the S.S. "Knoxville City". The jurisdiction of the District Court to try the case arises from Article 3, sections 1 and 2 of the United States Constitution reading as follows:

> "Section 1. The Judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.
>
> Section 2. The Judicial power shall extend to all cases of admiralty and maritime jurisdiction."

The Judicial Code provides, 28 U. S. C. A., section 371:

> "That the district court shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction * * * saving to suitors in all cases the right of a common law remedy where the common law is competent to give it."

Jurisdiction of the subject matter is disclosed by the libel filed by the appellants and the answer thereto. [A. (9210) pp. 3, 7, 10, 11.]* The final decree of the district court denying recovery to appellants for damages sustained by their cargo interests was entered on February 15, 1939. [A. (9210) p. 26.] This appeal was taken from said decree. The following papers giving this court jurisdiction have been regularly filed: Assignment of Errors, Petition for Appeal and Order Allowing Appeal. [A. (9210) pp. 30, 39, 44.]

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*Note. This appeal has been consolidated with the three other appeals in the causes arising out of the above collision, two apostles having been printed. Reference to the apostles in No. 9157 will be indicated by "[A. p. .....]" and to the apostles in No. 9210 by "[A. (9210) p. .....]".

The statutory provision giving this court jurisdiction to review the judgment of the District Court is found in 28 U. S. C. A., section 225:

> "(a) *Review of Final Decisions.* The circuit courts of appeals shall have appellate jurisdiction to review by appeal final decisions—
>
> "First. In the district courts, in all cases save where a direct review of the decisions may be had in the Supreme Court under section 345 of this title."

Statement of the Case.

The present appeal has been taken on behalf of the cargo laden on board the S.S. "Knoxville City". A great mass of conflicting testimony including that of disinterested witnesses who testified on behalf of both vessels, was heard by the lower court which accepted the version of facts given on behalf of the S.S. "Arkansan". The District Court thereupon held the S.S. "Knoxville City" solely liable for the collision which occurred and exonerated the S. S. "Arkansan" from any liability in connection therewith. Error has been assigned in various respects in connection with the findings of fact made by the District Court. A detailed discussion of the respects in which the District Court erred in so far as its findings of fact are concerned will be found in the brief submitted on behalf of the appellant, Isthmian Steamship Company, owner of the S.S. "Knoxville City". The present appellants join with the appellant, Isthmian Steamship Company, in the combined appeal which has been taken herein and respectfully ask that the contentions advanced in the brief of ap-

pellant, Isthmian Steamship Company, be considered in connection with this appeal with the same force and effect as if they had been incorporated herein. To eliminate duplication, and in the interest of brevity, these contentions will be omitted from this brief.

The Court will not, therefore, be asked to consider any disputed issues of fact whatever in the present brief. On the contrary, your appellants, for the purpose of the argument only, will concede that all of the facts with respect to this collision are exactly as claimed by the witnesses for the "Arkansan" in the testimony given by them at the trial. Nevertheless, we hope to demonstrate to this Court that even conceding all of the facts as claimed on behalf of the "Arkansan" and accepting her own version of these facts, she is not only at fault but grossly at fault for this collision.

We submit the following brief résumé of these facts as established by the testimony given by "Arkansan's" own witnesses:

On the early morning of September 19, 1937, the S.S. "Arkansan" arrived off the entrance to San Pedro Harbor. It was a clear night and visibility was good, lights both on the shore and on vessels being clearly visible for several miles. [Finding III, A. pp. 102, 454, 179, 193, 194, 225, 226, 273, 274, 306, 312, 349, 370-372, 401, 402.] At 5:03 A. M. the "Arkansan" was about a mile off the entrance between the ends of the two breakwaters outside of the harbor. [Finding V, A. pp. 102, 103, 454, 455, 222.] The lighthouse on the western breakwater bore

north by west. [Finding V, A. pp. 103, 472, 473, 222.] At this time the course of the "Arkansan", which had previously been NE½E [A. pp. 272, 492, 493] was changed 3 or 4 points to the left [Finding VI, A. pp. 103, 455, 494, 495, 265, 266] so that the "Arkansan" was heading for a point somewhat to the eastward of the red buoy lying off the end of the eastern breakwater. [A. pp. 494, 223.] The change of course thus made at 5:03 was about 3 or 4 points to the left. [A. pp. 455, 494.] The "Arkansan" continued on this course for about 2 or 3 minutes [A. pp. 455, 494], having to steady her wheel, however, to allow a fishing boat to pass clear. [A. p. 455.] Her course was then changed about a point to the left so that she was then heading on a compass course of north and practically straight for the red buoy. [Finding VII, A. pp. 103, 495, 455, 456.] She continued on this course for 3 or 4 minutes. [A. pp. 495, 456.] At 5:07 her engines, which had been proceeding at half speed up to that time, were put at slow speed. [Finding VIII, A. pp. 103, 495, 223.] At this rate it was estimated she was proceeding about 3 knots per hour. [Finding IX, A. pp. 103-104, 456.] She continued on this course heading almost straight for the buoy till 5:09 when her course was again changed to the left about 2 points [A. pp. 496, 247] so that the red buoy would be passed about a ship's length on the starboard side. [A. p. 457.] Her course at this time was NNW. [A. pp. 457, 247.] Thereafter her course was not changed as she was heading straight through the entrance between the two breakwaters well on her own starboard side of mid-channel. While proceeding on this course and just

prior to 5:11 A. M., the green side light and the white masthead light and the white range light of a vessel, which later proved to be the S.S. "Knoxville City", were observed off the port bow of the "Arkansan". [A. pp. 460, 311.] The "Knoxville City" was inside of the western breakwater [Finding IX, A. p. 104] and apparently heading toward the entrance between the breakwaters at a speed of about 8½-9 knots [A. p. 467] on a course which was crossing that of the "Arkansan" [A. p. 460] at an angle of almost 90 degrees. [Finding X, A. p. 104.] The "Arkansan" sounded a one blast signal [A. p. 251] which the "Knoxville City" answered almost immediately with one blast. Shortly thereafter the "Knoxville City" sounded one blast and the "Arkansan" answered this one blast signal immediately with a similar signal. [A. p. 462.] The "Knoxville City" then blew a long confused blast or blasts, as it was described, when the vessels were close together. [A. pp. 278, 319, 301.] The "Arkansan" immediately stopped her engines at 5:11½. [A. pp. 499, 201.] They were kept stopped till 5:12 when they were reversed full speed. [A. pp. 500, 201.] At the same time the wheel of the "Arkansan" was put hard over to the right [A. pp. 235, 289] as it was observed that the "Knoxville City" was making no effort to swing to starboard or pass under the stern of the "Arkansan". In spite of these precautions the bow of the "Knoxville City" struck heavily against the port side of the "Arkansan" from 30 to 60 feet from the bow of that vessel. [A. pp. 322, 467.] The collision occurred sometime between 5:12 and 5:13 A. M. [A. pp. 336, 337.]

On these facts representing "Arkansan's" own version of what took place, we respectfully submit that that vessel was at fault for the following reasons:

1. She maintained a grossly ineffective and improper lookout in failing to observe the "Knoxville City" till 5:11 A. M., only 2 minutes before the time when the collision actually took place.

2. The "Arkansan" did not reverse her engines in time when collision was or should have been apparent.

3. The "Arkansan" was guilty of a breach of International Rule 28 in that although she admittedly sounded two 1 blast signals she, nevertheless, failed to direct her course to starboard as required by Rule 28.

4. Even if the situation was one of crossing courses as found by the District Court, the "Arkansan," as the privileged vessel in such a situation, did not maintain her course and speed.

5. The situation presented, however, was not one of crossing courses but one of special circumstances in which it was the duty of each vessel to exercise all due care and to take prompt and adequate steps to avoid collision which the "Arkansan" failed to do.

It must be borne in mind that appellants' right to recover from the "Arkansan" for damage to cargo interests exists whether or not fault is found to exist on the part of the "Knoxville City" so long as it be established that there is fault on the part of the "Arkansan."

The Atlas, 93 U. S. 302, 23 L. Ed. 863;

The New York, 175 U. S. 187, 209, 20 Sup. Ct. Rep. 67, 44 L. Ed. 126.

Specifications of Errors.

The Specifications of Errors to be discussed in this brief are as follows:

I. The Court erred in not finding that the "Arkansan" failed to maintain a competent and efficient lookout. [See Assignment of Error IX, A. (9210) p. 37.]

II. The Court erred in not finding that the "Arkansan" failed to reverse her engines in adequate time to avoid collision. [See Assignment of Error XIV, A. (9210), p. 42.]

III. The Court erred in not finding that the "Arkansan" was at fault for sounding a one blast signal and for not directing her course to starboard after sounding such a signal. [See Assignment of Error VII, A. (9210) p. 36.]

IV. If the situation as the "Arkansan" and "Knoxville City" approached each other was one of crossing courses, as found by the Court, then the Court erred in not finding that the "Arkansan" failed to hold her course and speed. [See Assignment of Error VI, A. (9210) pp. 35 and 36.]

V. The Court erred in not finding that the situation which was presented as the "Arkansan" and "Knoxville City" approached each other was one of special circumstances and not one of crossing courses and that the "Arkansan" should have held back and not attempted to enter between the ends of the two breakwaters until after the "Knoxville City" had passed out. [See Assignments of Error XV and XVI, A. (9210) pp. 42 and 43.]

ARGUMENT.

POINT I.

The Court Erred in Not Finding That the "Arkansan" Failed to Maintain a Competent and Efficient Lookout.

Assignment of Error IX [A. (9210) p. 37, 38], addressed to the foregoing Point and relied upon by appellants is as follows:

* * * * * * * * *

> "The District Court erred in not finding that the Arkansan did not maintain a proper or efficient lookout since the Knoxville City was not observed by those on board the Arkansan until only about 2 minutes before the collision occurred, although the weather was clear, visibility was good, and lights could be seen clearly for a distance of several miles."

Point I—Argument.

Those on Board the "Arkansan" Were Grossly Negligent in Failing to Observe the "Knoxville City" in Time to Take Prompt and Effective Measures to Avoid Collision.

Probably no duty placed upon those navigating vessels at sea has been more rigorously or more strictly enforced by admiralty courts than that a sharp and attentive lookout must be maintained at all times. Thus the Supreme Court of the United States in the case of the *Genessee Chief,* 12 Howard 443 at 462, 13 L. Ed. 1058 has held that the failure to maintain a proper lookout creates a *prima facie* case of negligence against the vessel guilty of a breach of this duty. The United States Circuit Court

of Appeals for the Second Circuit has even gone so far as to hold in the case of *The Madison,* 250 Fed. 850, at 852, that the failure to maintain a proper lookout is equivalent to the breach of a statutory duty which places upon the transgressor the burden not only of proving that the breach did not contribute to the collision but that it could not have contributed to it. The language of the court is as follows:

> "It is true that this failure of the lookout was not a violation of any statutory rule; but we do not distinguish between the burden imposed upon a vessel which violates so stringent a requirement, although it depends only upon customary law, and that concededly imposed by the violation of a statutory rule."

When the question is raised as to whether the failure to maintain a proper lookout has contributed to the collision, the Supreme Court of the United States in the case of *The Ariadne,* 13 Wallace 475, 20 L. Ed. 542 has held as follows (page 479):

> "Every doubt as to the performance of the duty, and the effect of non-performance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary."

The present case adds one more to the list of those in which collision with heavy damage resulting therefrom was caused directly by the failure to maintain a proper lookout. The failure of those on board the "Arkansan" to observe the "Knoxville City" in time to take the proper steps to avoid the subsequent collision is particularly inexcusable in view of the admitted facts. Concededly, it was a bright clear night, visibility was good and lights

both on the shore and on vessels could be seen for several miles [A. pp. 474, 179, 193, 194, 225, 226, 273, 274, 306, 312, 349, 370-372, 401, 402.] The District Court has so held and its finding in this respect is not questioned [Finding III, A. p. 102]. But yet on such a bright night with visibility so good and lights visible at such a distance those on board the "Arkansan" did not see the "Knoxville City" till 5:11 A. M. [A. pp. 460, 177, 226, 311, 316, 317], which was less than two minutes before the vessels came into collision between 5:12 and 5:13 A. M. [A. p. 337]. This is established even by the evidence submitted on behalf of the "Arkansan". The log of that vessel records the fact that the "Knoxville City" was first seen at 5:11 A. M. [A. p. 254, "Knoxville City" Exhibits 1 and 2], just before the first signal of one blast was sounded by the "Arkansan." Her second officer testified that he first saw the "Knoxville City" at 5:11 A. M. [A. p. 226]. The lookout who was stationed as far forward as he could stand and whose sole duty it was to look for the presence of other vessels navigating in the vicinity, testified that when he first saw the "Knoxville City" he immediately went to the bell to report her presence by sounding the bell [A. p. 311]. Before he had reached the bell, and in the very brief period of time elapsing from the time when he first saw the "Knoxville City" to the time when he was going to the bell to report it, a one blast signal had been sounded by the "Arkansan" [A. p. 312]. This signal admittedly was sounded at 5:11 A. M. There cannot be the slightest doubt, therefore, that even on appellee's own testimony the "Knoxville City" was not observed by anyone on board the "Arkansan" until 5:11 A. M. It is equally undisputed that the collision occurred just before 5:13 A. M., as it is so recorded not only in the deck log

but in the engine room log of the "Arkansan" [A. p. 337, "Knoxville City" Exhibits 1, 2 and 4].

According to appellee's own testimony, therefore, on a bright clear night with visibility good and lights admittedly visible for several miles, those on board the "Arkansan" maintained so grossly improper a lookout that they failed to observe a vessel coming into dangerous proximity with themselves until *less than two minutes before they were in collision with that vessel.*

The grossness of their neglect in this respect is further demonstrated by the fact that according to the testimony of those on board the "Arkansan" [A. p. 456] and indeed according to the finding of the District Court [Finding IX, A. pp. 103, 104], the "Arkansan" was proceeding at the rate of only 3 or 4 knots per hour. At that rate of speed, she was proceeding at the rate of 300 to 400 feet per minute. In the 2 minutes, therefore, elapsing between 5:11 A. M., when the "Knoxville City" was first observed by those on board the "Arkansan," and 5:13 A. M., the time when the collision occurred, the "Arkansan" could not possibly have proceeded a greater distance than 600 to 800 feet. Since the length of the "Arkansan" was only 433 feet, this means that those on board the "Arkansan" did not observe the presence of the "Knoxville City" until the "Arkansan" was *less than 2 of her own ship lengths* away from the point where she finally came into collision with the "Knoxville City." In giving the point of collision as less than 2 ship lengths from the point where the "Knoxville City" was first observed, we have given the *maximum* distance. In view of the fact that during 1½ minutes of this interval of 2 minutes the engines of the "Arkansan" were stopped and reversed, the

movement of the "Arkansan" ahead through the water was undoubtedly considerably less than 800 feet. It is probable that in point of fact the "Arkansan" was not more than *1 or 1½* ship lengths away from the point of collision when those on board that vessel first observed the "Knoxville City" approaching in dangerous proximity.

Some excuse might be found for this otherwise grossly inexcusable neglect of duty on the part of those on board the "Arkansan" if conditions were such as to make the maintenance of a proper lookout either difficult or ineffective, but no such conditions existed at the time. On the contrary, conditions could not have been better for the maintenance of a proper lookout. As we have pointed out above, it is admitted in appellee's testimony, and found as a fact by the District Court, that visibility was good and that lights could be observed for several miles.

Nor was there anything about the "Knoxville City" herself which would have made it difficult to observe her. It was admitted that when she was first observed her green side light was burning and that her white foremast light as well as her white range light were burning [A. pp. 460, 311]. No complaint was made by those on board the "Arkansan" that these lights were dim or unsatisfactory in any way. As regulation lights they would be observed for a distance of at least 2 miles (Article 2, Inland Rules). There can be no doubt but that if there had been anything defective or improper about these lights those on board the "Arkansan" would have been quick to so testify, as it afforded a very ready excuse for their failure to observe the "Knoxville City" in time. The fact that they made no complaint whatever as to the

lights of the "Knoxville City" demonstrates clearly that these lights were proper and should have been observed in time.

It may be urged in explanation of the failure of those on board the "Arkansan" to observe the "Knoxville City" at an earlier time that she or her lights might have been partially obscured either by the breakwater or by the presence of other vessels anchored inside of the breakwater. It is obvious that the breakwater could not have interfered in any way with the view of those on board the "Arkansan" because when the "Knoxville City" was finally observed the breakwater was still between that vessel and the "Arkansan" [Finding IX, A. pp. 104, 177] just as the "Knoxville City" was passing the anchored S. S. "Dolius," which has been referred to at times in the testimony as the Blue Funnel ship [Finding XV, A. pp. 106, 310, 460]. If the breakwater did not shut her out from view or obscure her in any way at that time it could not have shut her out from view or obscured her previously. Furthermore, the master and second officer were stationed on the top bridge of the "Arkansan" [A. p. 463] which undoubtedly was well above the level of the breakwater. Even if this were not so, the masthead and range lights of the "Knoxville City" would show clearly above the top of the breakwater.

Nor could the presence of any other vessels have contributed in any way to obscuring the "Knoxville City" from view. In the first place, the testimony is that only 3 vessels lay between the point where the "Knoxville City" was originally anchored and the lighthouse at the end of the western breakwater. These vessels were the two United States ships "Vestal" and "Memphis" which were moored alongside of each other so that they were in effect

only one vessel [A. pp. 347, 348, 395, 396], and the "Dolius" referred to above which was considerably closer to the end of the breakwater [A. pp. 397, 398]. There is no reason why the "Knoxville City" should have been shut out from view by the presence of these vessels. There was no reason why those on board the "Arkansan" should have confused the lights of these anchored vessels with those of the "Knoxville City," as the lights of the anchored vessels were, of course, stationary while the white lights on the foremast and mainmast of the "Knoxville City" were moving. Furthermore, the "Knoxville City" was showing her *green side light* and this could not possibly have been confused with the stationary *white lights* of any vessels lying at anchor. The display of a green light could mean only one thing and that was that it was on a vessel under way, and the fact that this light was actually moving toward the course of the "Arkansan" should have been sufficient in itself to apprize those on board that vessel of approaching danger.

If it be contended on behalf of the "Arkansan" that it was more difficult to observe the lights of a moving vessel inside of the breakwater, these very difficulties made it more necessary that those on board the "Arkansan" should maintain an even more vigilant lookout than would have been necessary in open sea. It must have been clear to those on board the "Arkansan" that they were approaching a harbor where ships might reasonably be expected to be lying at anchor or moving in and out of the harbor at any hour. The very fact that there might be vessels anchored or moving inside of the breakwater or that the view of any

such vessels might be obscured in any way by the presence of the breakwater, are facts which should have stressed the necessity of maintaining an even more keen and vigilant lookout than would ordinarily have been the case.

The District Court has found, and the evidence presented on behalf of the "Knoxville City" shows that that vessel went full speed ahead on her engines at 5:04 [Finding XIV, A. p. 105]; that there was no substantial difference in the time kept on either of the two vessels as is evidenced by the fact that both recorded the time of collision as about 5:13 [A. pp. 337, 806] and the time when the first signals were exchanged as about 5:11 [A. pp. 254, 803]. At 5:05 the "Arkansan" was, according to her own testimony, less than a mile from the ends of the breakwaters and heading in toward the entrance to the harbor (her testimony is that she arrived off the entrance at 5:03 and was then about a mile off [A. pp. 454, 455, 222]). From 5:04 therefore, until 5:11, a total period of 7 minutes, the "Knoxville City" was proceeding at full speed on a course which those on board the "Arkansan" described as approximately at right angles to their own, with her white masthead and range light and her green side light plainly showing on a bright clear night with good visibility, but yet no one on board the "Arkansan" observed any of these lights or discovered the presence of the "Knoxville City" for this entire period of 7 minutes and until 5:11 A. M. when the "Arkansan" was *only about 1½ ship lengths from the point at which she finally came into collision with the "Knoxville City."*

A more gross breach of this duty to maintain a proper lookout, which is so rigorously and strictly enforced by the courts, can hardly be imagined.

As the Supreme Court of the United States said in the case of *The New York,* 175 U. S. 187, 204; 20 Sup. Ct. Rep. 67, 44 L. Ed. 126:

> "Her officers failed conspicuously to see what they ought to have seen or to hear what they ought to have heard. This, unexplained, is conclusive evidence of a defective lookout."

That the failure to observe the "Knoxville City" until such a brief time and at such a short distance from the point of collision, contributed very materially to bringing about the collision, is evidenced by the hurried and almost panicky things which were done by those on board the "Arkansan" immediately after the "Knoxville City" was discovered. Two sets of one blast signals were exchanged in less than ½ minute. At the end of this half minute interval the engines were stopped and for some reason which has never been explained, they were allowed to remain stopped for another half minute before they were reversed. Everything that was done was obviously done in a hurry and without the opportunity for that careful consideration which should have been had in such a dangerous situation.

If the "Knoxville City" had been observed shortly after she first got under way at 5:04 those on board the "Arkansan" would have had ample opportunity, after a first exchange of one blast signals, to observe carefully whether the "Knoxville City" was reducing her speed or directing her course to pass under the stern of the "Arkansan", as those on the latter vessel say they expected her to do. After waiting for a reasonable interval to see if the "Knoxville City" still showed no signs of slowing down or passing under the stern of the "Arkansan",

those on board that vessel should have repeated their signal and, if the "Knoxville City" still did not give any evidence of an intention to do what was expected of her, danger signals could have been sounded. All of these steps could have been taken in a leisurely fashion in the 7 minutes elapsing from the time when she started out till the time she was first discovered. If the "Knoxville City" still continued to come ahead at full speed without manifesting any intention of slowing down or taking other steps to avoid collision, those on board the "Arkansan" would have known in ample time that she was not going to do what was expected of her and a proper course of procedure should have been determined upon in ample time to take whatever steps might be necessary to avoid collision. None of these things, however, could be done by the "Arkansan" because nobody on board that vessel saw the "Knoxville City" in time to take the proper precautions. When she was finally discovered only 2 minutes before the time of the collision and when the "Arkansan" was not more than 1½ ship lengths from the place of the collision, those on board the "Arkansan" were compelled to act too quickly. No opportunity was given to them for proper reflection or consideration of what was to be done. They were compelled to make snap judgments and to act hurriedly. There was no time to study the movements of the "Knoxville City" to see what she was going to do. Quick action was essential, but quick action in such emergencies does not lead to the best results, as was manifest by what happened in the present case.

The need of observing a vessel in time, in order that proper steps may be seasonably taken to avoid collision has been repeatedly stressed by the courts in their decisions. The Supreme Court of the United States in the case of *The Sunnyside,* 91 U. S. 208, at 209, 23 L. Ed. 302, has said:

> "Precautions not seasonable are of little or no value, nor do such efforts constitute a compliance with the usages of the sea or the statutory rules of navigation. Such precautions must be seasonable in order to be effectual; and if they are not so, and a collision ensues in consequence of the delay, it is no defence to say that nothing more could be done to avoid the collision, nor that the necessity for precautionary measures was not perceived until it was too late to render them availing."

In the case of *The Atlas,* reported in 2 Fed. Cases No. 346, at pages 183, 186, the court disposed of the argument advanced on behalf of a vessel which had not maintained a proper lookout that it would have acted in the same way as it did even if it had seen the other vessel sooner, by stating as follows:

> "Early precaution is the most useful, and, it is safe to say, that, in such a channel it was peculiarly important, that, by a vigilant lookout, the Atlas should be apprised, at the earliest moment when this precaution was called for * * *. Had a lookout been in the performance of his duty, their information would have been earlier and, presumptively, more full. The act of congress requiring a lookout assumes

> this, as the general rule. There would have been more time for observation and for deliberation, and I think that early measures by porting would have been taken which would have tended to avoid the collision."

In the case of *The Sea Gull,* 90 U. S. 165, at pages 176, 177, 23 L. Ed. 90, the Supreme Court of the United States commented on the fact that sufficient time for reflection was not given to the officer of the deck because of the failure to maintain a proper lookout. The court said:

> "It is quite clear that the evidence will not support the conclusion that the negligence of the lookout did not materially contribute to the subsequent mistakes and vacillating conduct of the officer in charge of the deck of the steamer."

Evidence of the lack of reflection and the vacillating character of the actions taken by those on board the "Arkansan" is manifest by the fact that her engines were not stopped immediately. They were allowed to continue at slow speed for half a minute after the "Knoxville City" was first observed and then they were stopped and kept stopped for another very vital half minute. If those on board the "Arkansan" had had more time to consider the situation it is reasonably clear that they would not have kept their engines stopped in the face of the dangerous situation which then existed, but would have immediately reversed their engines as they should have. But, as the Supreme Court of the United States has held in the case of *The Adriadne, supra,* every doubt as to

whether the failure to maintain a proper lookout contributed to the collision must be resolved against the vessel which has failed to maintain a proper lookout. Furthermore, as the Court pointed out in *The Madison, supra,* the duty of the "Arkansan" is to show that her failure to maintain a proper lookout not only did not but that it could not have contributed to the collision.

It will, no doubt, be urged in behalf of the "Arkansan" that she was the privileged vessel and her duties fixed regardless of whether she maintained a proper lookout or not, but even assuming that she was a privileged vessel, this did not lessen in any way her duty to maintain a proper lookout. The court has thus stated the duty of the privileged vessel in *The Devonian,* 110 Fed. 588, at p. 592:

> "The rule requiring a lookout is imposed alike upon the burdened and privileged vessel. The duty of the privileged vessel is to hold her course; the duty of the burdened vessel is to keep off that course. But the privileged vessel is to hold her course, constantly observing the burdened vessel, in order to notice if the latter fails in her duty. When the failure of the burdened vessel becomes apparent, the privileged vessel must change her course as prudence commands.

It will undoubtedly also be contended on behalf of the "Arkansan" that fault on the part of the "Knoxville City" bringing about the collision having been clearly established, the Court should look no further than this in fix-

ing liability for the collision. The fact that the "Knoxville City" has been found guilty of fault, however, cannot excuse any failure to maintain a proper lookout on the part of the "Arkansan". As the court said in the case of *Delaware, L. & W. R. Co. v. Central R. Co. of New Jersey,* 238 Fed. 560, at p. 562:

> "At all events, a navigator may not blindfold his eyes, and then say, after collision, that although he did not see her at all, the fault under the rules was with the other vessel. The fundamental rule of the admiralty is that a vigilant lookout must be kept on all vessels, so that collision may be prevented even with those which are violating the rules. This is emphasized by article 29 of the Inland Regulations (U. S. Comp. St. 1913, §7903), applicable to this collision, which provides:
>
> 'No Vessel Under Any Circumstances to Neglect Proper Precautions.
>
> 'Art. 29. Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.'
>
> Who can say that this negligence on the part of the Roselle did not contribute to the collision? There is no obligation in navigation that this court is more disposed to enforce than the duty of keeping a proper lookout."

POINT II.

The Court Erred in Not Finding That the "Arkansan" Failed to Reverse Her Engines in Adequate Time to Avoid Collision.

Assignment of Error XIV [A. (9210) p. 42], addressed to the foregoing point and relied upon by appellants is set out as follows:

"XIV.

"The District Court erred in not finding that the Arkansan was at fault in merely stopping her engines at 5:11½ and allowing them to remain stopped for ½ minute instead of reversing them full speed immediately at that time, since danger of collision was or should have been obvious and that the failure to reverse her engines immediately was a proximate cause of the collision.

"The District Court erred in not finding that the Arkansan was at fault for not reversing her engines in time to prevent the collision, and more particularly for not reversing her engines prior to 5:11 a. m. since danger of collision had arisen prior to that time."

Point II—Argument.

The "Arkansan" Was at Fault for Not Reversing Her Engines in Time.

If, when vessels are approaching each other, danger of collision becomes apparent, it is their duty immediately to reverse their engines in order to check their headway. That the master of the "Arkansan" appreciated that a situation of danger had arisen at 5:11½ a. m. (a half minute after the "Knoxville City" was first observed) is evidenced by the fact that he ordered the engines stopped

at that time [A. p. 499] and the testimony of the engineer of that vessel is that the engines were in fact stopped at that time [A. p. 201]. The master admitted that he considered collision imminent at that time [A. pp. 463, 464]. It was the sounding of the so-called "confused" signal which caused the stopping of the engines and at that time the vessels were only about 100-200 feet apart [A. pp. 278, 301]. Even if, for the sake of argument, we concede that the "Arkansan" was a privileged vessel in a crossing course situation, the moment that the engines were stopped the privilege of the "Arkansan" ceased at that moment and it became her duty immediately to do all that was necessary and possible to avoid collision at that time. *Benalla,* 45 F. (2d) 864, 866. In a situation of such obvious danger the first need was to reduce the way of the "Arkansan" as much as possible. The most effective way to check the headway of the "Arkansan" was to reverse her engines immediately, but the master of the "Arkansan" did not do so but waited for a very precious half minute, according to both the deck and engineroom logs of the "Arkansan", before he finally gave this vitally necessary order to reverse the engines full speed. During this period of ½ minute his vessel was continuing ahead at almost her full slow ahead speed of 300 to 400 feet per minute. Obviously, if the engines had been reversed immediately when proceeding at such a rate of speed, she could have been stopped or her speed very greatly reduced. There is every reason to believe that if her engines had been been reversed immediately instead of being merely stopped

she would have been brought to a standstill at least 100 feet further back from the point of collision. Since the point of impact on the "Arkansan" was only from 30 to 60 feet from the stem [A. pp. 322, 467], it is clear that if the engines of the "Arkansan" had been backed immediately instead of being kept stopped for ½ minute, the collision would not have occurred regardless of any question as to the fault of the "Knoxville City". A very similar situation was presented to the Court in the case of *The Benalla, supra.* In that case, the Benalla was admittedly the privileged vessel in a crossing course situation. The burdened vessel was grossly at fault but Judge Learned Hand then sitting in the District Court, but now presiding justice of the United States Circuit Court of Appeals for the Second Circuit, held the Benalla also at fault because she merely stopped her engines and kept them stopped for a full minute instead of reversing them full speed in an obvious situation of danger. The Court in that case said (pp. 865-6):

> "The most unquestioned fault, to my mind, of the Benalla is in the fact that when she determined to act, she did not act properly. I refer to the fact that for an interval of a minute, she stopped her engines and did not reverse. If she had done so at once, the collision would not have happened. As it was, she was nearly stopped in the water and the Dalzell all but crossed her bow. Had she reversed for two minutes instead of one, it is all but demon-

strable she would not have hit at all. * * * There is no possible excuse, so far as I can see, in failing to reverse at once when he decided to check his speed. At that time his duty as privileged vessell was past and he recognized that he must attempt to avoid collision by checking his headway."

See also:

Bern, 74 F. (2d) 235, 237;

Cotopaxi, 20 F. (2d) 568, 570.

In the present case there can be no possible excuse for the "Arkansan's" failure to reverse her engines immediately. It was obvious to those on board that vessel *at that time* that the "Knoxville City" was making no attempt to pass under the stern of the "Arkansan" but was continuing to head directly across her course and at full speed. The vessels were not more than a length or two apart. Something had to be done and had to be done immediately. That he realized the necessity for immediate action is evidenced by the fact that the master of the "Arkansan" stopped his engines at 5:11½, admitting that collision was imminent [A. p. 463]. He would not have stopped his engines since he believed his vessel to be the privileged one unless he knew that his privilege no longer existed and that it was incumbent upon him to take immediate action in view of the situation of danger which was presented. No reason has been suggested why he did not immediately reverse his engines at this precarious moment instead of merely stopping them. The

vessels were then so close together that only the most effective measures could possibly succeed in avoiding disaster. Merely stopping the engines of the "Arkansan" when she was approaching at the rate of 300 to 400 feet per minute could not possibly have avoided the collision. Only the immediate reversing of the engines at full speed could have avoided the collision but, yet for a vital half minute at this most important time, the master of the "Arkansan" hesitated apparently unable to make up his mind just what to do and allowed his engines to remain stopped without reversing them. We submit that this neglect on his part unquestionably helped to bring about the collision, as it seems reasonably clear that if his engines had been reversed immediately he would certainly have been able to have checked the headway of his ship at a greater distance than 30 to 60 feet from the point where the collision subsequently occurred. The courts have uniformly held that when a situation of danger becomes apparent a vessel's engines must be immediately backed. Thus in the case of *The Quogue,* 47 F. (2d) 873, the navigator was held at fault for not reversing immediately instead of just slowing down and stopping his engines. The Court stated at page 874:

> "His duty as a prudent navigator was not merely to sound the alarm and slow and stop his engines, but to get the way off his vessel as promptly as possible. He did not reverse as promptly as he should. * * * the courts have very definitely declared that there is a duty to stop and reverse as soon as danger of collision is seen to exist because of doubt as to what the other vessel may do."

In the case of the *Albert Dumois,* 177 U. S. 240, 20 Sup. Ct. Rep. 595, 44 L. Ed. 751, the Supreme Court of the United States held the privileged vessel at fault for not immediately backing when a situation of danger arose. It said (p. 252):

> "The fault of the Argo was not in the hard-a-port order when the collision was inevitable, but in failing to stop and reverse at once as soon as she noticed the starboarding of the Dumois."

See also:

The El Sol, 45 F. (2d) 852;

A. H. Bull S. S. Co. of U. S., 34 F. (2d) 614, 616.

It will no doubt be argued that the act of the master in allowing the engines of the "Arkansan" to remain stopped from 5:11½ to 5:12 was excusable since it was an exercise of his judgment *in extremis* in a situation brought about by the negligence of the "Knoxville City". The same argument was advanced in the case of *The Benalla, supra,* and answered as follows (pp. 865-866):

> "Nevertheless, the undisputed facts in this case seem to me to make it impossible to excuse the Benalla. I do not forget the difficulties under which she was. There is perhaps no position so trying to a navigator as that of a privileged vessel obliged to hold her course and speed, and yet continually approaching the burdened vessel, which disregards her own duties. * * * Mr. Bradley urges that the judgment was *in extremis* and, the fault of the Dalzell being so gross, I ought not to review the judgment made in such circumstances. But the case is not that. I do not question the time at which the

> Benalla decided to act; I assume that her pilot was justified in holding on for so long as he did. My complaint is that when he did act, he failed to act as any navigator should have done."

In the present case too while the captain of the "Arkansan" might be excused for not acting at all till 5:11½, nevertheless when he did decide to act at that time he should have acted properly, that is, instead of merely stopping his engines at that time *he should have reversed them immediately.* We might add also that the excuse of the exercise of his judgment *in extremis* is not available in this case because the necessity for taking action hurriedly at 5:11½, one-half minute after the "Knoxville City" was first observed, was brought about by the previous neglect of those on board the "Arkansan" to discover the presence of the "Knoxville City" until 5:11 a. m., just half a minute before the master of the "Arkansan" realized that some action had to be taken by him and he then stopped his engines. If those on board the "Arkansan" had observed the "Knoxville City" some 6 or 7 minutes previously, *i. e.,* at 5:04 when the "Knoxville City" first proceeded at full speed ahead, the master of the "Arkansan" would not have been required to take such hurried and ill considered action as he did at 5:11½, but would have had ample time for reflection and determination on the proper course to pursue. The defense that his act in failing to reverse his engines immediately was one *in extremis* is not available where the necessity for such action is brought about by his own previous neglect.

Albert Dumois, supra, p. 252;

Protector, 113 Fed. 868;

Manchioneal, 243 Fed. 801, 804, 805.

POINT III.

The Court Erred in Not Finding That the "Arkansan" Was at Fault for Sounding a One Blast Signal and for Not Directing Her Course to Starboard After Sounding Such a Signal.

Assignment of Error VII [A. (9210) p. 36], addressed to the foregoing point and relied upon by appellants is set out as follows:

"VII.

"The District Court erred in not finding that the Arkansan failed to turn to her right after blowing a one-blast signal but that, on the contrary, she turned to her left and in not concluding that the Arkansan's maneuvers in those respects constituted a fault proximately causing or contributing to the collision.

"The District Court erred in not finding that the sounding of a one-blast signal by the Arkansan was not only unnecessary and unjustified, but was confusing to the navigator of the Knoxville City in that under Article 28 of the International Rules, the sounding of a one-blast signal indicated a change of course by the Arkansan to starboard, which she did not in fact make."

Point III—Argument.

The Sounding of a One Blast Signal Indicated Under the International Rules That thf "Arkansan" Was Directing Her Course to Starboard and Her Failure to Direct Her Course to Starboard in Conformity With the Rule Misled the Navigator of the "Knoxville City" and Thereby Contributed to the Collision.

At the time when the "Arkansan" sounded her first one-blast signal she was still outside of the line of the two

breakwaters which mark the boundary line between the international and the inland waters. Accordingly, she was in international waters and subject to the international rules for the navigation of vessels at sea. As is stated in LaBoyteaux on The Rules of the Road at Sea, page 2:

> "The International Rules apply to all vessels on the high seas, *i. e.,* outside of the lines dividing the high seas and coast waters as defined by governmental authority."

When she sounded her second one-blast signal the "Arkansan" was still outside of the breakwaters and still in international waters. Under Article 28 of the International Rules one short blast means "I am directing my course to starboard." The two one-blast signals sounded by the "Arkansan", therefore, under Article 28 of the International Rules, meant that she was directing her course to starboard. Admittedly, however, she did not at any time direct her course to starboard after sounding either of these two one-blast signals. The only changes of course which she made from the time she arrived off the entrance to the harbor at 5:03 were changes to port, and never to starboard. [A. p. 258.]

The failure of the "Arkansan" to direct her course to starboard as required under Article 28 was a breach of a statutory duty and the burden is placed upon her to show not only that this breach did not but that it could not have contributed to the collision.

Pennsylvania, 19 Wall. 125, 136, 22 L. Ed. 148;

Silver Palm, 94 Fed. (2d) 754, 759 (C. C. A. 9);

Koyei Maru, 96 Fed. (2d) 652, 653 (C. C. A. 9);

Belden v. Chase, 150 U. S. 674, 699, 14 Sup. Ct. Rep. 264, 37 L. Ed. 1218.

In fact the very breach of the statutory duty raises the presumption that it has contributed to the collision.

> *Martello,* 153 U. S. 64, 74, 14 Sup. Ct. Rep. 723, 38 L. Ed. 637.

No evidence, however, was submitted to rebut this presumption or to show that this breach did not or could not have contributed to the collision.

In the case of *The Housatonic,* 43 Fed. (2d) 125, a similar situation was presented. In that case the Basse Indre was the privileged vessel in a crossing situation on the high seas and The Housatonic was the burdened vessel. The Housatonic blew a one-blast signal to indicate, as she contended, her intention of passing under the stern of the Basse Indre as required by the Rules. The Basse Indre answered this signal with a one-blast signal. The court held that by doing so the Basse Indre surrendered her privilege and her duty to hold her course and speed and assumed the duty of the requirement placed upon her by the sounding of her one-blast signal, namely, to direct her course to starboard. The court in holding the Basse Indre at fault, stated as follows:

> "I think as above indicated, that by answering the Housatonic's signal the navigator of the Basse Indre possibly supposed he was merely signifying his understanding that the Housatonic would port and go under the Basse Indre's stern, and that he did not realize that under Article 28 (33 U. S. C. A. 113) his answer

meant that he must also go to starboard. But, if my assumption be correct, that misconception cannot let her go free. A vessel which blows a whistle must, under article 28, act accordingly and the vessel to which the signal was blown is entitled to count on such action."

It may be contended on behalf of the "Arkansan" that this failure on the part of that vessel to direct her course to starboard did not cause any difficulty and could not have contributed toward the collision because the master of the "Knoxville City" realized that it merely indicated that the "Arkansan" was informing the "Knoxville City" that the situation was one of crossing courses in which "Arkansan" would hold her course and speed. A similar argument was presented on behalf of the Basse Indre in the case of *The Housatonic, supra,* but was rejected for the reasons set forth in the decision in that case, as cited above.

There is no evidence, however, that the master of the "Knoxville City" did not expect the "Arkansan" to swing to starboard after the sounding of this signal. On the contrary, he testified in response to a question by the court that he did expect her to change her course to starboard, as would any navigator familiar with the International Rules [p. 811]. Even a seaman acting as quartermaster on the U. S. S. "Vestal", who was called as a witness on behalf of the "Arkansan", testified that he expected the "Arkansan" to proceed to starboard after sounding her

one-blast signal, and so strong was his conviction on this question that he even thought the "Arkansan" did proceed to starboard in accordance with her one-blast signal. [A. p. 388.]

There can be no merit in the contention that the "Arkansan" sounded her one-blast signal merely to notify the "Knoxville City" that the "Arkansan" was the privileged vessel in a crossing course situation and would maintain her course and speed. The International Rules do not provide for the sounding of any such signals in a crossing course situation. *La Boyteaux,* p. 122. Nor are such signals necessary even under the Inland Rules.

Haida, 191 Fed. 623, 626.

It is immaterial, however, what the master of the "Arkansan" may have meant by his signal. The meaning of the signal is fixed by the wording of the statute itself. *Lisbonense,* 53 Fed. 293, 302. *La Boyteaux* in his Rules of the Road at Sea, states with respect to this point at pages 123, 124:

> "The International Rules do not contain any sound signals to be given by a privileged vessel to indicate that she will keep her course and speed."
>
> * * * * * * * * *
>
> "The definite and precise duty to keep her course and speed is imposed upon the holding-on vessel."

It may well be that the master of the "Knoxville City", when he was informed by the first one-blast signal of the

"Arkansan" that she was going to direct her course to starboard according to the rules, permitted himself as an extra margin of safety to swing still further away from the end of the western breakwater because of the assurance given to him by the navigator of the "Arkansan" that the latter was going to proceed to starboard. Undoubtedly it was to get this extra assurance from the "Arkansan", indicated by her first one-blast signal, that the master of the "Knoxville City" sounded his second one-blast signal which was immediately answered by the "Arkansan" thus giving him the assurance he was asking for. No other explanation seems to have been suggested for this second exchange of one-blast signals.

It is not, however, the duty of these appellants to show in what respects the "Arkansan" may have confused those on board the "Knoxville City" by sounding her one-blast signals or that these signals contributed in any way to bringing about the collision. The presumption is against the "Arkansan". The burden of showing that the "Arkansan's" breach of her statutory duty to direct her course to starboard after sounding her one-blast signals not only did not but could not have contributed to the collision, rested upon the "Arkansan" and she has submitted no evidence whatever to discharge her duty in this respect or to rebut the presumption created by her statutory violation.

Pennsylvania, 19 Wall. 125, 136, 22 L. Ed. 148;

Martello, 153 U. S. 64, 74, 75, 14 Sup. Ct. Rep. 723, 38 L. Ed. 637.

POINT IV.

If the Situation as the "Arkansan" and "Knoxville City" Approached Each Other Was One of Crossing Courses, as Found by the Court, Then the Court Erred in Not Finding That the "Arkansan" Failed to Hold Her Course and Speed.

Assignment of Error VI [A. (9210) pp. 35 and 36], addressed to the foregoing Point and relied upon by appellants, is set out as follows:

* * * * * * * *

> "The District Court erred in not finding that the Arkansan, as the privileged vessel in a crossing course situation, changed her course and speed in violation of her statutory duty when there was 'risk of collision', and that these changes of course and speed contributed directly to bring about the collision."

Point IV — Argument.

If the "Arkansan" Was the Privileged Vessel in a Crossing Course Situation She Was at Fault on Her Own Statement of Facts Because She Did Not Maintain Her Course and Speed.

For reasons which we shall hereafter point out, we hope to establish to the Court's satisfaction that the situation of these two vessels as they approached each other was not one of crossing courses but one of special circumstances. Accepting, however, the finding of the District Court that the case was in fact one of crossing courses, then under article 21 of both the International and the Inland Rules

the "Arkansan" was under the duty of keeping her course and speed. The testimony submitted on her behalf, however, shows unmistakably that she failed to do so.

The duty of the privileged vessel to keep her course and speed arises when the vessels are in a position where there is risk of collision. This risk arises in the case of vessels approaching each other on such courses that if maintained there will be the slightest possibility of collision. *La Boyteaux,* page 106. The S. S. "Knoxville City", after raising her anchor, went full speed ahead on her engines at 5:04 A. M. Her course was then roughly parallel to the western breakwater. At that time the "Arkansan" was heading at half speed for a point somewhat to the starboard of the red buoy off the end of the eastern breakwater [A. pp. 494, 495]. The courses of the two vessels were crossing at that time and risk of collision was apparent. Nevertheless, a few minutes after 5:04 the "Arkansan" admittedly changed her course to the left so as to head direct for the red buoy [A. p. 495]. Again 2 or 3 minutes later, and at 5:09, she changed her course once more to the left two points and this time headed on a course on which she would pass the red buoy about a ship's length away on her starboard side [A. pp. 496, 457]. She continued this course till 5:12 when her wheel was swung hard right at the same time that the engines were reversed about a minute before collision [A. p. 235].

According to "Arkansan's" own testimony, she changed her course twice to the left after 5:04 A. M. [A. pp. 455,

456, 222, 247, 265, 266] at a time when the "Knoxville City" was heading on an apparent course of about 90 degrees to that of the "Arkansan" and when both vessels were heading toward each other on crossing courses. In fact the wheelsman testified that the course of the "Arkansan" was changed 1½ points to the left *after she sounded her first one blast signal and after the "Knoxville City" had first been seen* [A. pp. 287, 288]. This was a clear violation of article 21 which required that the "Arkansan" keep her course and speed. Like any other breach of a statutory duty, the violation put upon the "Arkansan" the duty of showing not only that the violation did not but that it could not have contributed to the subsequent collision. *Silver Palm,* 94 Fed (2d) 754, 759 (C. C. A. 9); *Koyei Maru,* 96 Fed. (2d) 652, 653 (C. C. A. 9); *Pennsylvania,* 19 Wallace 125, 136; 22 L. Ed. 148; *Belden v. Chase,* 150 U. S. 674, 699; 14 Sup. Ct. Rep. 264, 37 L. Ed. 1218. The breach created a presumption of fault on the part of the "Arkansan." *Martello,* 153 U. S. 64, 74, 14 Sup. Ct. Rep. 723, 38 L. Ed. 637.

The testimony submitted on behalf of the S. S. "Arkansan" also shows that at 5:07 A. M., 3 minutes after the "Knoxville City" proceeded full speed ahead on a course apparently crossing that of the "Arkansan," the engines of the "Arkansan" were reduced from half speed to slow speed [A. pp. 225, 495, 201]. This was also a breach of article 21 requiring the "Arkansan" not only to keep her course but to keep her speed.

No effort has been made to explain or account for these statutory violations on the part of the "Arkansan," nor was any effort made to show that they could not have contributed to the collision. On the contrary, it seems manifest that these violations unquestionably did help bring about the collision. Her changes of course to the left obviously brought her closer to the course of the "Knoxville City" and made it difficult for that vessel to negotiate the turn at the end of the western breakwater and pass out through the entrance. Prior to 5:07 A. M. the engines of the "Arkansan" were proceeding at half speed. The testimony is that at half speed she would make between 6 and 7 knots per hour [A. p. 211], that is she would proceed ahead at the rate of from 600 to 700 feet per minute. At 5:07 her engines were changed from half speed to slow speed. The testimony is that at slow speed the "Arkansan" proceeded at the rate of from 3 to 4 knots per hour [A. p. 456], or 300 to 400 feet per minute. Since this change of speed from half speed to slow speed was made at 5:07 [A. pp. 225, 495, 201] and the engines were not reversed till 5:12 [A. pp. 202, 500] the "Arkansan," proceeding at the rate of 3 to 4 knots per hour under her slow speed of 300 to 400 feet per minute, covered a total distance during this period of 5 minutes of between 1500 and 2000 feet. If, however, the "Arkansan," instead of reducing her speed to slow speed, had continued at half speed from 5:07 to 5:12 in this same period of 5 minutes, proceeding at the rate of 600 to 700 feet per minute, she would have covered between 3000 and 3500 feet. In other words, if she had not changed her speed

at 5:07 from half speed to slow speed, she would have advanced 1500 feet further than she actually did advance under her reduced speed. Since at the time of the collision the "Arkansan" was struck between 30 to 60 feet from her bow [A. pp. 322, 467], it is evident that if she had proceeded this additional 1500 feet (3 to 4 ship lengths) further in toward the harbor she could not have been hit by the "Knoxville City." The reduction of her speed from half speed to slow speed was directly responsible for putting her in the place where she was at the time the collision occurred, instead of 1500 feet farther up in the harbor.

Although the burden of establishing that this change of speed could not have contributed to the collision was placed upon the "Arkansan," she made no effort to explain why her changes of speed or course were made, nor did she make any effort to show that these changes did not contribute to the collision. On the contrary, the evidence which she did adduce demonstrates unmistakably that her change of course and speed actually did bring about the collision.

In the case of the *Brittania,* 153 U. S. 130, 14 Sup. Ct. Rep. 795, 38 L. Ed. 660, the Supreme Court of the United States held the privileged vessel at fault for checking her headway and thus placing herself in the position where collision was made possible. See also *Lie v. San Francisco & P. S. S. Co.,* 243 U. S. 291, 298, 37 Sup. Ct. Rep. 270, 61 L. Ed. 726.

POINT V.

The Court Erred in Not Finding That the Situation Which Was Presented as the "Arkansan" and "Knoxville City" Approached Each Other Was One of Special Circumstances and Not One of Crossing Courses and That the "Arkansan" Should Have Held Back and Not Attempted to Enter Between the Ends of the Two Breakwaters Until After the "Knoxville City" Had Passed Out.

Assignments of Error XV and XVI [A. (9210) pp. 42 and 43], addressed to the foregoing Point and relied upon by appellants, are as follows:

"XV.

"The District Court erred in not finding that the Arkansan should have held back in order to permit the Knoxville City to pass out beyond the ends of the breakwaters before the Arkansan tried to enter and that the Arkansan was at fault for proceeding to enter at a speed which was excessive under the existing circumstances while the Knoxville City was attempting to pass out.

"XVI.

"The District Court erred in not finding that the situation which was presented as the Arkansan and Knoxville City approached each other was one of special circumstances and not of crossing courses."

Point V. — Argument.

The Situation Presented When the Vessels First Began to Navigate With Respect to Each Other Was One of Special Circumstances and Not of Crossing Courses.

The District Court has held that the courses of the vessels, as they approached each other, were "at a broad angle of approximately ninety degrees" and that accordingly the vessels were on what is known as "crossing courses" [Finding X, A. p. 104].

The mere fact, however, that the "Knoxville City" was temporarily headed toward the "Arkansan" at an angle of about 90 degrees does not mean that she was on a definite or fixed course at that time, such as would be necessary in a case of "crossing courses." On the contrary, the evidence is clear that the "Knoxville City" was not and could not have been on a definite and fixed course. Admittedly she was bound out of the harbor. It is true that after she left her anchorage, it was necessary for her to proceed temporarily in a direction roughly parallel with the western breakwater and approximately at an angle of 90 degrees to the course of the "Arkansan," but this was clearly only a temporary heading which she was required to hold until she reached the end of the western breakwater. At that point she would be required to change her heading approximately 90 degrees to the right in order to pass out of the harbor between the ends of the breakwaters. Obviously, therefore, while she was on this temporary heading, she was not on a steady or fixed course. She was merely engaged in the preliminary maneuvering which was necessary to put her on her regular course after she had emerged from the harbor.

Similarly, as the "Arkansan" was heading in between the breakwaters, she too was not on a definite course. She was also maneuvering to enter the harbor and temporarily was on a heading approximately 90 degrees to that of the "Knoxville City."

Both vessels, therefore, were maneuvering on preliminary headings and were not on any fixed courses. For this reason the situation is similar to that so often considered by the Courts of vessels entering or leaving slips. In such situations the Courts have uniformly held that since the vessels are not on regular courses, the case is one of special circumstance and the ordinary steering and sailing rules do not apply. The rule has been thus expressed in the case of *Wm. A. Jamison,* 241 Fed. 950 at 951:

> "A vessel coming out of her slip and maneuvering to get on her course, or one maneuvering to get into her slip, is not navigating upon any course, and the steering and sailing rules do not apply."

See also to the same effect:

Coamo, 267 Fed. 686;

Cherokee, 70 Fed. (2d) 316.

This same rule has been applied to the case of vessels entering or leaving areas enclosed by breakwaters. *Poling Bros., No. 2,* 62 Fed. (2d) 357, and to the case of a vessel emerging into view in a channel after having been previously obscured by the presence of another vessel. *Cotopaxi,* 20 Fed. (2d) 568. See also *Devonian,* 110 Fed. 588.

In all of these cases the underlying principle is that until vessels are on their regular courses and while engaged in

preliminary maneuvers or headings to get on these courses, the ordinary steering and sailing rules do not apply. The vessels are required to employ the ordinary care and skill of reasonably prudent and skillful navigators.

In the present case the ordinary steering and sailing rules likewise did not apply until the "Knoxville City" had made her 90 degree turn at the end of the western breakwater and passed out between the breakwaters. Up to that time it was incumbent upon the navigator of the "Arkansan", under the special circumstance rule, to employ the care and skill of a reasonably prudent navigator under the circumstances existing at the time.

There can be no doubt as to just what navigation was called for on the part of the "Arkansan" in employing the care and skill required in such a situation. There was no question as to what the course and movements of the "Knoxville City" would be or what the maneuver was which she was performing. It was perfectly clear that she had left an anchorage inside of the western breakwater and was proceeding toward the gap between the ends of the two breakwaters in order to swing to the right at that point and pass out of the harbor between the ends of the breakwater. There is no dispute in the testimony as to this. The captain of the "Arkansan" knew beyond question that the "Knoxville City" had no intention of continuing on the temporary heading on which she was proceeding when he first saw her since this would have brought her past the end of the eastern breakwater and into the water inside of the eastern breakwater. The captain of the "Arkansan" knew, of course, that the "Knoxville City" was not bound for any such point. It

was perfectly obvious to him that she would eventually proceed out between the breakwaters on a course which would pass his port to port. He realized the greater difficulties of procedure which confronted the navigator of the "Knoxville City". He saw or could easily have seen that as she was proceeding toward the channel between the ends of the two breakwaters she would have to keep clear of the anchored vessels which she was passing. He saw, too, that when she reached the end of the breakwater she would then have to make a sharp turn which would require all of the available water she could be given in order to make this 90 degree turn and head out toward the open sea. The "Arkansan" herself at this time was hampered in no way in her navigation. She was out beyond the breakwaters in the open sea with no other vessels near her to interfere in any way with her navigation. From 5:03 A. M. she had been heading in toward the entrance between the two breakwaters. There was no need for her to make any sharp turn in order to pass in. Every advantage of navigation lay with her; every corresponding disadvantage lay with the "Knoxville City". Under such circumstances the courts tend to favor the vessel whose ability to maneuver properly is impeded in any way and to place a higher burden of care upon the vessel whose maneuvering ability is entirely unimpeded. Thus a vessel proceeding with the tide is favored in its navigation against one proceeding against it. *Galatea,* 92 U. S. 439, 446, 23 L. Ed. 727; *Edna V. Crew,* 182 Fed. 890, 893. A vessel encumbered with a tow ordinarily is favored in its navigation as against one not so encumbered. *Syracuse,* 9 Wall. 672, 675, 676, 19 L. Ed. 783. In spite of all these facts and although she was approaching a comparatively narrow entrance between two breakwaters

enclosing a harbor in which anchored vessels were lying and from which vessels might be expected to emerge at any time, and although she appreciated all the difficulties of navigation which confronted the navitagor of the "Knoxville City" in negotiating this sharp turn at the end of the western breakwater, and although all the advantages of maneuvering lay with the "Arkansan", she nevertheless insisted on pressing in toward this narrow entrance with the result that she finally passed the "Knoxville City" at a time when the latter vessel was actually engaged in making this sharp and difficult turn of almost 90 degrees in order to pass out between the ends of the two breakwaters. That the "Arkansan" did meet the "Knoxville City" practically at the entrance between the breakwaters is shown by the testimony of her second officer [A. p. 263] and of her wheelsman [A. p. 295] that at the time of the collision the stern of the "Arkansan" had just about cleared the inside of the breakwaters.

We respectfully submit there can be no excuse whatever to justify the "Arkansan" in crowding in through this narrow passageway at a time when another vessel was engaged in the difficult maneuver of attempting to swing around such a sharp turn in this same narrow passage. This is exactly the type of situation which was intended to be covered by Article 29 both of the Inland and International Rules which is referred to so often as the rule of "special circumstances". This rule says that nothing shall exonerate the master of a vessel from "the neglect of any precaution which may be required by the ordinary practice of seamen." The rule has been interpreted to require a navigator under all circumstances to act with the proper degree of care and caution.

In a very similar situation the Supreme Court of the United States in the case of *The Alleghany,* 9 Wall. 522, 19 L. Ed. 781, held an inbound steamer solely at fault for failing to hold back, off the entrance to a harbor, in order to permit a tug encumbered with a tow to straighten out on her course after making a 90 degree turn while trying to leave the harbor and enter a cut leading to the waters of Lake Michigan. In that case, too, the inbound steamer attempted to crowd in as the tow was endeavoring to leave the harbor with the result that the inbound steamer collided with the tow as the tow was engaged in making its 90 degree turn on its way out of the harbor.

The "Arkansan" entirely failed to take into account the special circumstances involved in the meeting of these two vessels practically in the passage between the breakwaters. The dangers inherent to the vessels meeting at that point should have been obvious to any practical navigator. The obvious thing for the "Arkansan" to do in the situation presented to her was to lie to well off the entrance between the breakwaters until the "Knoxville City" had passed out safely, but this the "Arkansan" did not do. We do not believe this was due to any failure on the part of her captain to appreciate what could or should have been done under such circumstances. His failure to adopt the simple and obvious course required of him under such circumstances was due not to any failure on his part to appreciate what should have been done but was due solely to the fact that neither he nor any one else on board the "Arkansan" saw the "Knoxville City" until the "Arkansan" was almost in the very entrance between the two breakwaters. As we have heretofore pointed out, the "Knoxville City" was not observed by any one on

board the "Arkansan" until 5:11 A. M. This was a little less than two minutes before the actual collision. The stern of the "Knoxville City", as we have pointed out above, at the time of the collision was just inside of the breakwaters. Obviously, therefore, at two minutes prior to that time she could not have been more than a ship length or two outside of the entrance, since her speed, according to her own story, was only three or four knots per hour at that time. At this rate of speed, she would cover between 300 and 400 feet per minute, so that in two minutes she would not be more than 600 to 800 feet away from the point at which she was when the collision occurred. Furthermore, at 5:11½ when the engines were stopped the breakwater light was abeam [A. p. 499]. In fact the log of the "Arkansan" shows that at 5:11½ when her engines were stopped, that is, only a half minute after the "Knoxville City" was first observed, the "Arkansan" was then abreast of the light on the western breakwater [Knoxville City, Exhibit No. 1, A. 865]. It is clear, therefore, that a half a minute previously the "Arkansan" could not have been more than 150 or 200 feet away from the entrance between the ends of the breakwaters.

Undoubtedly, therefore, the reason why the navigator of the "Arkansan" did not lie to well out from the entrance to the breakwaters was because neither he nor any one else on board the "Arkansan" saw the "Knoxville City" until the "Arkansan" was actually about to pass

between the ends of the breakwaters and not more than half a ship's length away from the entrance. If he had seen her just after she had picked up anchor at 5:04 A. M. when the "Arkansan" was about a mile off the entrance to the breakwaters he could have easily held back until after the "Knoxville City" had come out of the harbor.

When the navigator on the "Arkansan" finally did observe the "Knoxville City" at 5:11 A. M., when the "Arkansan" was less than two lengths from the entrance between the breakwaters, his navigation of the "Arkansan" was badly hampered by his misunderstanding of the situation then presented. His testimony is that he considered the vessels at that time to be on crossing courses. Accordingly, he felt it was incumbent upon him to keep his course and speed, which he did. As a matter of fact, however, the situation was not one of crossing courses, as we have pointed out above, but one of special circumstances in which it was his duty immediately to take all necessary precautions to avoid collision. If he had stopped and reversed his engines immediately at 5:11 in the dangerous conditions which then existed, it is clear collision would have been avoided for the reasons set forth under Point II herein.

In spite of the misunderstanding of the navigator of the "Arkansan" that the situation was one of crossing courses instead of one of special circumstances, collision could have been avoided if the "Arkansan" had held the course and speed on which she was proceeding when the "Knoxville City" should have been first observed, namely, at or about 5:04 A. M. At that time the engines of the "Arkansan" were proceeding at half speed. They were changed to slow speed at 5:07 A. M., four minutes before

the "Knoxville City" was observed. Undoubtedly if the "Knoxville City" had been observed by those on board the "Arkansan" at any time prior to 5:07, the engines of that vessel would not have been reduced to slow speed but would have been continued at half speed as required in a crossing course situation. If this had been done collision would have been avoided, since as we have pointed out under Point IV herein, if the "Arkansan" had continued at half speed she would have been more than a thousand feet beyond the point of collision before the "Knoxville City" had reached that point.

It is clear when the admitted facts are considered that the "Arkansan" was so navigated as to create the maximum hazard of collision possible. There were three courses open to her, as she headed for the breakwaters:

1. to maintain her speed;
2. to hold back until it was apparent that the passing could be made in safety;
3. to proceed as she did with the result that she met the "Knoxville City", outbound, virtually in the passage between the breakwaters.

Courses 1 and 2 would have avoided all danger of collision. Course 3, which she took, created the obvious hazard which resulted in the collision. Under these circumstances, we submit that the "Arkansan" obviously did not navigate with the care required by the special circumstances of the case and the precaution required by the ordinary practice of seamen.

Conclusion.

In conclusion, we call attention to the fact that appellants are presenting this appeal on behalf of innocent cargo interests on the S. S. "Knoxville City". It is true the District Court has found that fault on the part of the "Knoxville City" brought about this collision. There is no reason, however, why, even if this Court should find fault on the part of the "Knoxville City", this fault should be imputed in whole or in part to the cargo interests on board that vessel or that they should be prejudiced in any way by reason of a finding of fault on the part of the "Knoxville City". Cargo interests on that vessel were free from any fault and entirely innocent. Accordingly, if fault on the part of the "Arkansan" should be found by this Court for the reasons hereinabove set forth, cargo interests on the "Knoxville City" are entitled to a recovery in full against the S. S. "Arkansan".

The Atlas, 93 U. S. 302, 23 L. Ed. 863;

The New York, 175 U. S. 187, 209, 20 Sup. Ct. Rep. 67, 44 L. Ed. 126.

This is not a case in which, as was contended by opposing counsel in the District Court, the fault of the "Knoxville City" was so flagrant that the Court should not be too astute in seeking to detect fault on the part of the "Arkansan". On the contrary, it is a case where fault of the "Arkansan" is flagrant and gross for the reasons hereinabove set forth. That fault undoubtedly was largely instrumental in bringing about the collision and the

"Arkansan" should be made to respond in full for the very substantial damage and loss sustained by the innocent cargo interests on the S. S. "Knoxville City" without regard to any finding of fault which may be made with respect to the S. S. "Knoxville City".

We respectfully submit that the decree of the District Court should be reversed and a recovery in full with interest and costs should be granted to appellants herein.

Respectfully submitted,

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